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STATE OF ILLINOIS

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ILLINOIS COMMERCE COMMISSION

2007 JUL 24 A 9:36



APPELLATE COURT

THIRD DISTRICT

OTTAWA

CHIEF CLERK'S OFFICE

A NOTICE OF ISSUANCE OF MANDATE

DATE: 10/02/06

TO: Illinois Commerce Commission  
160 N. LaSalle Street  
Suite C-800  
Chicago, IL 60601

CASE NO. 3-05-0479

ICC No. 04-0476

TITLE: ILLINOIS POWER COMPANY  
d/b/a AMERENIP,  
Petitioner-Appellant,  
v.

ILLINOIS COMMERCE COMMISSION,  
A.E. STALEY MANUFACTURING COMPANY,  
ARCHER-DANIELS-MIDLAND COMPANY,  
CATERPILLAR, INC., TEEPAC, LLC, THE  
PEOPLE OF THE STATE OF ILLINOIS,  
BUSINESS ENERGY ALLIANCE AND RESOURCES,  
INC., CONSTELLATION NEWENERGY-GAS  
DIVISION, CITIZENS UTILITY BOARD, and  
DYNEGY, INC.,  
Respondents-Appellees.

RECEIVED  
10/02/06  
10:00 AM  
CHIEF CLERK'S OFFICE  
ILLINOIS COMMERCE COMMISSION

Dear Clerk:

Pursuant to Supreme Court Rule 368 I am returning to you for filing the Mandate in the above entitled cause.

Please sign the enclosed copy and return to this office.

*Mist Freshman*

Clerk of the Appellate Court

Received Mandate:

10/06/06

By:

*J.R.C. [Signature]*

STATE OF ILLINOIS



APPELLATE COURT      THIRD DISTRICT  
OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the year of our Lord  
Two thousand six, within and for the Third District of  
Illinois:

Present -

HONORABLE DANIEL L. SCHMIDT, Presiding Justice

HONORABLE TOM M. LYTTON, Justice

HONORABLE MARY M. McDADE, Justice

HONORABLE MARY K. O'BRIEN, Justice

HONORABLE WILLIAM E. HOLDRIDGE, Justice

HONORABLE KENT SLATER, Justice

HONORABLE ROBERT L. CARTER, Justice

GIST FLESHMAN, Clerk

ILLINOIS  
COMMERCE COMMISSION  
JAN 01 - 5 PM 12:48

STATE OF ILLINOIS



APPELLATE COURT

THIRD DISTRICT

OTTAWA

3-05-0479

ILLINOIS POWER COMPANY  
d/b/a AMERENIP,  
Petitioner-Appellant,  
v.

ICC No. 04-0476

ILLINOIS COMMERCE COMMISSION,  
A.E. STALEY MANUFACTURING COMPANY,  
ARCHER-DANIELS-MIDLAND COMPANY,  
CATERPILLAR, INC., TEEPAK, LLC, THE  
PEOPLE OF THE STATE OF ILLINOIS,  
BUSINESS ENERGY ALLIANCE AND RESOURCES,  
INC., CONSTELLATION NEWENERGY-GAS  
DIVISION, CITIZENS UTILITY BOARD, and  
DYNEGY, INC.,  
Respondents-Appellees.

BE IT REMEMBERED, that, to-wit: On the 12th day of  
May, 2006 an Order of the aforementioned Court was entered of  
record and in accordance with the views expressed in the attached  
Order the judgment of the Illinois Commerce Commission is Decision  
of ICC is confirmed.

In accordance with Supreme Court Rule 368, this mandate  
is issued.

Costs to be taxed in accordance with the law.

ILLINOIS  
COMMERCE COMMISSION  
1009 OCT - 8 P 12:48

STATE OF ILLINOIS



3-05-0479 & 3-05-0480

Illinois Power v. ICC

APPELLATE COURT

THIRD DISTRICT

OTTAWA

At a term of the Appellate Court, begun and held at  
Ottawa, on the 1st Day of January in the year of our Lord  
Two thousand six, within and for the Third District of  
Illinois:

Present -

HONORABLE DANIEL L. SCHMIDT, Presiding Justice

HONORABLE TOM M. LYTTON, Justice

HONORABLE MARY W. McDADE, Justice

HONORABLE MARY K. O'BRIEN, Justice

HONORABLE WILLIAM E. HOLDRIDGE, Justice

HONORABLE KENT SLATER, Justice

HONORABLE TOBIAS G. BARRY, Justice

GIST FLESHMAN, Clerk

BE IT REMEMBERED, that afterwards on

May 12, 2006

the Order of the Court was filed

in the Clerk's Office of said Court, in the words and figures  
following viz:

X

X

X

RECEIVED  
CLERK'S OFFICE  
MAY 11 - 5:10 PM 2006

180-1124  
The text of this opinion may be changed  
or corrected prior to the time for filing of a  
Petition for Rehearing or the disposition  
of the same.

→ No. 3--05--0479

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2006

ILLINOIS POWER COMPANY	)	Appeal from the Illinois
d/b/a AMERENIP and DYNEGY INC.,	)	Commerce Commission,
	)	Docket No. 04-0476
Petitioner,	)	
	)	
v.	)	
	)	
ILLINOIS COMMERCE COMMISSION,	)	
A.E. STALEY MANUFACTURING	)	
COMPANY, ARCHER-DANIELS-MIDLAND	)	
COMPANY, CATERPILLAR, INC., TEEPAK,	)	
LLC, THE PEOPLE OF THE STATE OF	)	
ILLINOIS, BUSINESS ENERGY ALLIANCE	)	
AND RESOURCES, INC.,	)	
CONSTELLATION NEWENERGY-GAS	)	
DIVISION, CITIZENS UTILITY BOARD,	)	
	)	
Respondents.	)	

ORDER

Illinois Power Company (the company) filed tariff sheets with the Illinois Commerce Commission (the Commission) requesting that the Commission approve a general increase in the rates that the company charges to transport and deliver natural gas to its customers in Illinois. After an evidentiary hearing, the Commission granted only a portion of the proposed increase. The company appeals from that ruling. We confirm the Commission's ruling.

## FACTS

In this appeal, the company challenges certain findings of the Commission related to the company's gas storage reservoir known as the Hillsboro Storage Field (Hillsboro). Thus, we will only present those facts necessary to resolve that limited issue.

The Hillsboro reservoir is located underground and contains two different storage layers. The top layer, called working gas, is the volume of gas in the reservoir that is withdrawn from storage to be supplied to customers in the winter months. The bottom layer, called the base gas, is the volume of gas required to provide adequate pressure to cycle the working gas. Base gas is usually broken down into two components -- recoverable base gas and non-recoverable base gas. Recoverable base gas is the gas that the utility expects to be able to recover when the reservoir is retired. The non-recoverable base gas is the gas that the utility does not expect to recover from the reservoir when the reservoir is retired.

Generally speaking, a utility will replace the working gas used by the customers during the winter season by injecting gas back into the reservoir during the non-winter season. While the utility uses stored reservoir supply to meet winter peak demand, it is also avoiding the costs associated with contracting for other winter firm supply resources. The storage reservoir's working gas is comprised of summer injections that are usually less expensive than winter resources. Therefore, there is usually an economic incentive to make use of storage reservoir supplies.

The company expanded the capacity of Hillsboro in 1993. The expansion increased the working gas inventory from 3.1 billion cubic feet (BCF) to 7.6 BCF, increased the peak day capacity (the amount of gas that can be withdrawn per day) from 50,000 million cubic feet (MCF) to 125,000 MCF, and increased the base gas amount to 14.1 BCF. The Commission approved the expansion and

found Hillsboro to be 100% used and useful based on those values.

The company operated Hillsboro at those levels for the 1993-1994 season but then started to experience problems. Hillsboro began operating at a lesser level. The company underwent numerous procedures to try to determine the cause of the problem. After several years, it was determined that Hillsboro had experienced a significant gas measurement error from 1993 to 1999 and that a large amount of gas had been depleted from the reservoir. Through various tests and analyses, the company estimated that the error caused an inventory overstatement of 5.8 BCF at Hillsboro. The company determined that as a result of the measurement error, it had withdrawn gas from Hillsboro in excess of those levels that it had maintained in its working gas volumes and had withdrawn gas from its recoverable base gas inventory. That recoverable base gas was withdrawn over a period of years and erroneously used to serve customer load. The base gas that was withdrawn was lower priced than the gas that the company had placed in Hillsboro during the injection season.

The company has since returned Hillsboro to its intended peak day capacity of 125,000 MCF. The company has also reinjected some gas into the reservoir to make up for some of the gas that was depleted and has plans to do more reinjections in the future to return Hillsboro's working gas inventory back to 7.6 BCF by 2006.

The company filed its tariff sheets in June of 2004. A portion of the requested rate increase was related to Hillsboro. The company requested that the Commission approve an increase in the value of the company's base gas inventory at Hillsboro by over \$10 million for the test year. The proposed increase was to go into effect in August of 2004. The Commission, however, suspended that request. An adversarial proceeding followed. Several additional parties -- including the Attorney

General and the Citizens Utility Board -- were allowed to intervene. The Commission's Staff (Staff) also filed an appearance and took part in the proceeding. The evidence presented at the hearing, which is pertinent to the issue raised on appeal, is as follows.

Staff's expert, Eric Lounsberry, testified that he was assigned to review whether the company's natural gas storage facilities are used and useful, the reasonableness of the various capital additions that the company has made since its last rate case, and certain other matters. In his testimony, Lounsberry opined that Hillsboro should not be classified as 100% used and useful. Lounsberry explained that a used and useful disallowance was appropriate because Hillsboro is not currently, and has not for some time, operated in the manner that it was designed to operate when the reservoir was expanded in 1993. Hillsboro's operating levels over the past several years were summarized in a table as follows:

Winter Season	Peak Day Rating 93-0183	Peak Day Rating Actual	Percentage of 93-0183 Rating	Volume to Cycle 93-0183	Actual Volume Cycled	Percentage of 93-0183 Rating
1993-1994	125,000	125,000	100.00	7,600,000	7,583,611	99.78
1994-1995	125,000	125,000	100.00	7,600,000	5,951,065	78.30
1995-1996	125,000	125,000	100.00	7,600,000	4,937,930	64.97
1996-1997	125,000	125,000	100.00	7,600,000	4,291,916	56.47
1997-1998	125,000	125,000	100.00	7,600,000	4,230,985	55.67
1998-1999	125,000	125,000	100.00	7,600,000	4,099,140	53.94
1999-2000	125,000	100,000	80.00	7,600,000	3,050,370	40.14
2000-2001	125,000	100,000	80.00	7,600,000	2,916,351	38.37
2001-2002	125,000	100,000	80.00	7,600,000	2,759,938	36.31
2002-2003	125,000	100,000	80.00	7,600,000	2,576,839	33.91
2003-2004	125,000	125,000	100.00	7,600,000	2,616,540	34.43



Lounsberry calculated Hillsboro to be only 53.44% used and useful. Lounsberry described in detail how he arrived at that percentage and explained why he believed that it was the appropriate percentage to be used. Lounsberry stated that he calculated the used and useful percentage by splitting the value of Hillsboro into two components -- peak day capacity and seasonal price variation. Lounsberry chose those components because they matched the same information that the company had provided to the Commission in the previous proceeding to support the expansion of Hillsboro. Lounsberry calculated the benefit associated with Hillsboro's peak day capacity by comparing the post-expansion capacity of Hillsboro (125,000 MCF per day) to the price that the company paid for pipeline capacity and the gas supply reservation costs associated with a swing<sup>1</sup> contract for the same amount in 2003. Lounsberry calculated the value of seasonal savings due to the price variation between summer injections and winter gas prices assuming a full 7.6 BCF of inventory is cycled from the field. In that analysis, Lounsberry compared the weighted average cost of gas in storage for the past five winter seasons to the weighted average price of commodity gas purchased by the company for the same time period. From that comparison, Lounsberry determined the average per unit savings achieved per month associated with the company having natural gas storage. Lounsberry took the monthly per unit savings and multiplied those values by the volume of gas that the company withdrew from Hillsboro in the winter season of 1993-1994 (the only occasion where the company cycled 7.6 BCF from Hillsboro). Lounsberry selected a five-year period in order to eliminate any year to year variation that might exist due to extreme weather conditions or other unexpected factors. Lounsberry used the value of the benefits that should accrue to ratepayers from peak day savings and seasonal

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<sup>1</sup>A swing contract is one where the utility can nominate any volume for delivery between zero and the contract maximum.

price variation to determine the allocation percentages in the used and useful calculation. Lounsberry calculated those percentages to be 36.79 and 63.21 respectively. In making his calculations, Lounsberry made use of the three-year average for the amount of peak day capacity and working gas inventory that was available to ratepayers for the years 2001 through 2003. Lounsberry used those particular three years because they were the only years with known data and he had some concerns about using projected data. As one of those concerns, Lounsberry commented that it appeared that the company may have some difficulty in meeting its planned injection level at Hillsboro. Lounsberry also commented that he had several overall concerns regarding the manner in which the company has operated its natural gas storage fields and explained what those concerns were and what they were based upon. Lounsberry then applied the percentage savings values in order to determine the final used and useful numbers.

An exhibit was presented detailing Lounsberry's used and useful calculation as follows.

#### Hillsboro Used and Useful Calculation

		Peak Day Capacity 91-0183	Peak Day Capacity Annual	Percent of Maximum
1	2002	125,000	100,000	80.00
2	2003	125,000	100,000	80.00
3	2004	125,000	125,000	100.00
4	Average			86.67
		Inventory to Cycle 93-0183	Volume Cycled Actual	Percent of Maximum
5	2002	7,600,000	2,759,938	36.31
6	2003	7,600,000	2,576,839	33.91
7	2004	7,600,000	2,616,540	34.43
8	Average			34.88

9	Peak Day Allocation	35.83
10	Seasonal Inventory Allocation	64.17
11	Used and Useful Percentage	53.44

Line 1 = Capacity of Hillsboro in 2002 per ENG 1.77  
 Line 2 = Capacity of Hillsboro in 2003 per ENG 1.77  
 Line 3 = Capacity of Hillsboro in 2004 per ENG 1.77  
 Line 4 = Sum of percentage values (lines 1-3) divided by 3  
 Line 5 = Inventory Cycled from Hillsboro in 2002 per ENG 1.77  
 Line 6 = Inventory Cycled from Hillsboro in 2003 per ENG 1.77  
 Line 7 = Inventory Cycled from Hillsboro in 2004 per ENG 1.77  
 Line 8 = Sum of percentage values (lines 5-7) divided by 3  
 Line 9 = Per ICC Staff Exhibit 17.0R, Schedule 17.03R, line 8  
 Line 10 = Per ICC Staff Exhibit 17.0R, Schedule 17.03R, line 7  
 Line 11 = (line 4 \* line 9) + (line 8 \* line 10)

Lounsberry commented that the company had failed to maintain its storage reservoirs in an appropriate manner and that it is not equitable for ratepayers to continue paying for Hillsboro as if it were operating at 100% used and useful when it had not been so operating for quite some time.

Lounsberry also testified that he did not believe the company should be allowed to make the \$10 million increase to the value of Hillsboro's base gas inventory that the company was requesting. Lounsberry opined that the company could only estimate how much gas had been depleted from Hillsboro and that the company's estimate was not sufficiently reliable to justify an increase in the base gas inventory. Lounsberry recommended that the original base gas inventory amount that was used in a previous proceeding before the Commission be used for purposes of the rate base and that the company's subsequent investment in Hillsboro be excluded.

The company's expert, Kevin Shipp, disagreed with Lounsberry's conclusions. Shipp opined that Hillsboro should be found to be 100% used and useful because it has been returned to peak day capacity of 125,000 MCF and because the company plans to have the working gas volume back up to 7.6 BCF by the beginning of the 2006-2007 winter season.

Shipp testified further that even if he assumed that a used and useful adjustment should be

made, Hillsboro should still be found to be at least 84.33% used and useful. Shipp explained his calculations in detail and described why he disagreed with Lounsberry's calculations and with Lounsberry's conclusions. Most notably, Shipp disagreed with Lounsberry's use of the three year period from 2001-2003 rather than a three year period comprised of the year before the rate order, the year of the rate order, and the year following the rate order, as the Commission has done in previous rate cases, which were not as unique regarding metering errors as we have in this case. Shipp also disagreed with the rate that Lounsberry used in his calculations for replacement firm transportation service stating that Lounsberry used only the company's NGPL contract in determining the rate when he should have used both the NGPL and the PEPL source contracts. And finally, Shipp took issue with the manner in which Lounsberry calculated the seasonal difference savings. Shipp opined that the appropriate comparison would be to compare the cost of gas when it is injected to the spot price of gas at the time of withdrawal utilizing future prices, not historical prices. Shipp pointed out that based on current operating parameters, the gas cost savings produced by the operation of Hillsboro exceed the revenue requirement associated with including the full plant investment in rate base. In further testimony, Shipp disputed the general concerns over storage operations that had been raised by Lounsberry.

An exhibit was presented, which showed Shipp's used and useful calculation as compared to Lounsberry's as follows.

**Lounsberry's Calculation<sup>2</sup>****Value      Notes**

108,333  
 125,000      2002-2004  
 86.67%      A./B.

2,651,106      2002-2004  
 7,600,000  
 34.88%      D./E.

\$8,836,857      64.17% G./I.  
 \$4,934,663      35.83% H./I.  
 \$13,771,520

53.44%      (G.%xF.)+(H.%xC.) J. Used and Useful Rate

A. Peak Day Expected Deliv. Avg.  
 B. Peak Day Capacity  
 C. Avg. Utilization Rate - Peak

D. Volume Cycled - Avg.  
 E. Volume Cycled - Max.  
 F. Avg. Utilization Rate - Volume

G. Volumetric Savings  
 H. Peak Day Capacity Value  
 I. Total Savings

**Shipp's Calculation****Notes**

a. 125,000      2003/04 to 2005/06  
 b. 125,000  
 c. 100.00%      a./b.

d. 4,072,180      2003/04 to 2005/06  
 e. 7,600,000  
 f. 53.58%      d./e.

g. \$6,400,473      33.76% g./I.  
 h. \$12,555,750      66.24% h./I.  
 I. \$18,956,223

j. 84.33%      (g.%xf.)+(h.%xc.)

Shipp also disagreed with Lounsberry's conclusion regarding the company's \$10 million investment in its recoverable base gas inventory at Hillsboro. Shipp opined that the company's \$10 million investment should be included in the company's rate base. Shipp explained why he felt that the investment should be included in rate base and explained why he disagreed with Lounsberry on this issue.

At the hearing, Staff and the company also presented testimony in response to the expert testimony that had already been given. Lounsberry's response to Shipp's testimony was presented. As could be expected, Lounsberry disagreed with Shipp's conclusions and testified that Shipp's conclusions did not cause Lounsberry to change his own opinion. As to Shipp's comments about the appropriate three year period to be used in the used and useful calculation, Lounsberry pointed out that this was a unique circumstance that the Commission had not faced before where an asset that had previously been found to be fully used and useful was no longer 100% used and useful, based upon

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<sup>2</sup>Some of the headings in this exhibit have been changed slightly from that presented to reduce confusion.

its operation.

Shipp's response to Lounsberry's response was also presented. As could be expected, Shipp disagreed with the conclusions that were drawn by Lounsberry in Lounsberry's response.

After all of the evidence was presented, as part of the statutory procedure, an administrative law judge (ALJ) reviewed the evidence and the record and issued a proposed order. The ALJ's proposal was to rule in favor of the company on the Hillsboro issues. The Commission, however, rejected that portion of the order and ruled in favor of its own Staff, essentially adopting Lounsberry's analysis and Staff's arguments. The Commission went on to grant only a portion of the proposed increase in gas rates that the company was seeking. This appeal followed.

#### ANALYSIS

The company argues that the Commission erred in granting only a portion of the company's proposed rate increase. The company focuses on the Commission's treatment of Hillsboro and asserts that for the appropriate period of review, the Commission incorrectly found: (1) that Hillsboro is only 53.44 percent used and useful; and (2) that the company could not include in its rate base the \$10 million the company spent to replace the base gas that had been depleted from Hillsboro. We will address each of those assertions in turn.

In resolving this issue, we are mindful that setting utility rates is a legislative rather than a judicial function. Business and Professional People for Public Interest v. Illinois Commerce Comm'n, 146 Ill. 2d 175, 196, 585 N.E. 2d 1032, 1039 (1991). The Commission – and not this court – is the fact-finding body. Business and Professional People for Public Interest, 146 Ill. 2d at 196, 585 N.E. 2d at 1039. The Commission's findings of fact are to be accepted as *prima facie* true and cannot be

set aside on appeal unless they are against the manifest weight of the evidence. Business and Professional People for Public Interest, 146 Ill. 2d at 196, 585 N.E. 2d at 1039; 220 ILCS 5/10-201(d)(West 2005). Accordingly, our review of the Commission's orders is limited to determining whether the Commission: acted within the scope of its statutory authority; set out findings of fact adequate to support its decisions; issued findings which were supported by the manifest weight of the evidence; and rendered decisions which do not infringe upon a constitutional right. Business and Professional People for Public Interest, 146 Ill. 2d at 196, 585 N.E. 2d at 1039; 220 ILCS 5/10-201(e)(iv)(West 2005).

It has long been recognized that judicial deference to the Commission's judgment is especially appropriate in the area of setting rates. Central Illinois Public Service Co. v. Illinois Commerce Comm'n, 243 Ill. App. 3d 421, 445, 610 N.E. 2d 1356, 1372 (1993). Because of its complexity and need to apply informed judgments, rate design is uniquely a matter for the Commission's discretion. Central Illinois Public Service Co., 243 Ill. App. 3d at 445, 610 N.E. 2d at 1372-1373. When a utility files a request for a rate increase in the form of a new tariff schedule, the Commission has the authority upon complaint or its own initiative to hear evidence, hold hearings and determine the propriety of the requested increase. Business and Professional People for Public Interest, 146 Ill. 2d at 195, 585 N.E. 2d at 1039; 220 ILCS 5/9-201(b)(West 2005). The Commission must determine whether the proposed rates are just and reasonable and must do so within the regulatory parameters which prohibit retroactive and single issue rate making. Business and Professional People for Public Interest, 146 Ill. 2d at 195, 585 N.E. 2d at 1039.

In establishing the rates that a public utility is permitted to charge its customers, the Commission must first determine the utility's revenue requirement. Business and Professional People

for Public Interest, 146 Ill. 2d at 195, 585 N.E. 2d at 1039. The components of the revenue requirement have frequently been expressed in the formula  $R$  (revenue requirement) =  $C$  (operating costs) +  $Ir$  (invested capital or rate base times rate of return on capital). Business and Professional People for Public Interest, 146 Ill. 2d at 196, 585 N.E. 2d at 1039. Ratemaking is done in the context of a test year. Citizens Utilities Co. of Illinois, 124 Ill. 2d at 200, 529 N.E. 2d at 512-513.

Before the costs of constructing a new plant or making significant additions to an existing plant may be included in the utility's rate base, the Commission must determine that the plant is both prudent and used and useful in providing utility service to the utility's customers. Business and Professional People for Public Interest, 146 Ill. 2d at 196, 585 N.E. 2d at 1039; 220 ILCS 5/9-212 (West 2005). The same principle applies to investments. Only the value of those investments which is both prudently incurred and used and useful may be included in the utility's rate base. 220 ILCS 5/9-211 (West 2005). Throughout the rate proceedings, the utility has the burden of proving that its investments meet these requirements. Business and Professional People for Public Interest, 146 Ill. 2d at 196, 585 N.E. 2d at 1039.

Keeping the above legal principles in mind, we now turn to a resolution of the issue before us. As noted above, the company asserts that two of the Commissions findings were incorrect. The company first asserts that the Commission erred in finding that Hillsboro is only 53.44% used and useful for purposes of inclusion in the company's rate base. In that regard, the company first contends that it should be found to be 100% used and useful because Hillsboro is again currently running at its designed peak capacity of 125,000 BCF and because Hillsboro is both necessary in meeting customer demand and economically beneficial in doing so (statutory language emphasized). As the company correctly notes, that statutory language has been used by the Commission before in



making a used and useful determination. The issue here, however, is slightly different. Staff was not disputing that Hillsboro is somewhat used and useful, just whether Hillsboro is 100% used and useful for the purpose of this rate case. Lounsberry testified that based on its previous and current operating status, he did not believe that Hillsboro should be found 100% used and useful. Lounsberry calculated the used and useful percentage to be 53.44%. Lounsberry explained in detail how he reached that conclusion. Thus, there is sufficient support in the record for the Commission's conclusion and we will not overturn it here.

As a fallback position, the company contends that even if a used and useful adjustment was appropriate, the final result should have been a much higher used and useful percentage. In making that claim, the company points to several alleged errors in the Commission's analysis, including among others, that an incorrect three year period and an incorrect gas replacement value were used in making the used and useful determination. Thus, the company invites us to substitute our judgment for that of the Commission. This we cannot and will not do. See Central Illinois Public Service Co., 243 Ill. App. 3d at 444, 610 N.E. 2d at 1371. The Commission's findings are entitled to great deference on appeal, especially on the issue of rate setting. Central Illinois Public Service Co., 243 Ill. App. 3d at 445, 610 N.E. 2d at 1372. Our role here is merely to determine if those findings were against the manifest weight of the evidence. Business and Professional People for Public Interest, 146 Ill. 2d at 196, 585 N.E. 2d at 1039. To rule in favor of the company, we would have to find that a conclusion opposite of what the Commission found is clearly evident from the record. See Continental Mobile Telephone Co., Inc. v. Illinois Commerce Comm'n, 269 Ill. App. 3d 161, 171, 645 N.E. 2d 516, 523 (1994). We cannot make that finding here.

The company next asserts that the Commission erred in refusing to allow the company to

include in its rate base the \$10 million the company spent replenishing the depleted gas levels at Hillsboro. The company contends that its determination of the amount of gas that was depleted was sufficiently reliable to justify inclusion of the investment in its rate base. The Commission disagreed with that contention and we must uphold that conclusion because it is not contrary to the manifest weight of the evidence. At the hearing, Lounsberry testified that it was unknown how much gas had been depleted from Hillsboro and that the Company's determination was not reliable. Lounsberry explained why he believed that the company's estimate in that regard could not be relied upon. The mere fact that the company's witness, Shipp, testified to the contrary does not justify a reversal. See Central Illinois Public Service Co., 243 Ill. App. 3d at 444, 610 N.E. 2d at 1371. The credibility of expert witnesses and the weight to be given to their testimony are matters for the Commission to decide as finder of fact. Central Illinois Public Service Co., 243 Ill. App. 3d at 444, 610 N.E. 2d at 1371. We may not substitute our interpretation of the evidence for that of the Commission. Central Illinois Public Service Co., 243 Ill. App. 3d at 444, 610 N.E. 2d at 1371.

The Hillsboro matters were fully litigated before an expert tribunal – the Commission. In its written order, the Commission accurately set forth the relevant testimony that was presented on the matter and the arguments of the respective parties. This was a battle of experts. The Commission ultimately adopted Lounsberry's analysis and rejected the analysis of Shipp and of the ALJ. The Commission has the discretion to do just that. See Central Illinois Public Service Co., 243 Ill. App. 3d at 444, 610 N.E. 2d at 1371. The Commission's conclusions were founded upon Lounsberry's testimony and thus, have adequate support in the record and are not contrary to the manifest weight of the evidence.

We recognize, as the company points out, that one could draw an inference from portions of

the final order and portions of Lounsberry's testimony, that the Commission was essentially punishing the company for past mistakes. Such a practice cannot stand. See Citizens Utilities Co. of Illinois v. Illinois Commerce Comm'n, 153 Ill. App. 3d 28, 33, 504 N.E. 2d 1367, 1371-1372 (1987) (retroactive ratemaking is prohibited in Illinois; rates are to be charged prospectively only). We are not convinced from this record, however, that retroactive ratemaking occurred in the present case. Although there was discussion of the company's prior mistakes in managing Hillsboro and in diagnosing the problem, that evidence was presented in the context of showing why Staff was relying on known historical information, rather than projected subsequent information, in making its calculations.

For the foregoing reasons, the decision of the Illinois Commerce Commission is confirmed.

Confirmed.

BARRY, J., with LYTTON and O'BRIEN J. J. concurring.

STATE OF ILLINOIS



APPELLATE COURT

THIRD DISTRICT

OTTAWA

STATE OF ILLINOIS, )  
APPELLATE COURT, ) ss.  
THIRD DISTRICT )

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and the keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete FINAL ORDER of the said Appellate Court in the above entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 2nd day of October in the year of our Lord two thousand and six

*Wm. F. Freshman*

\_\_\_\_\_  
Clerk of the Appellate Court